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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

**THE AMERICAN WATERWAYS OPERATORS,
INC., et al.,**

Appellees,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA**

**PETITION OF APPELLEES THE AMERICAN WATER-
WAYS OPERATORS, INC., AMERICAN INSTITUTE OF
MERCHANT SHIPPING, ASSURANCEFORENINGEN
GARD, et al., FOR REHEARING**

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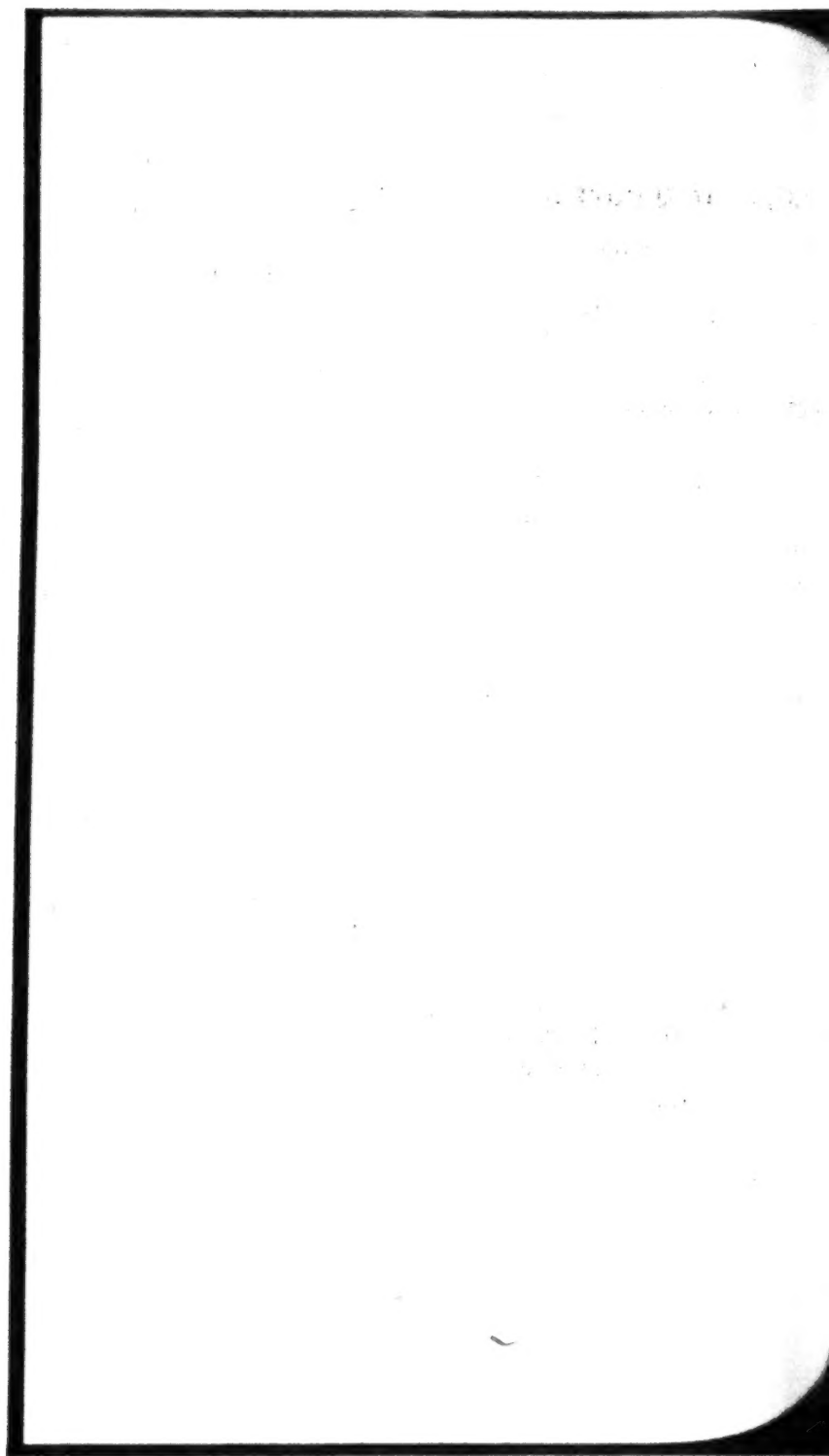
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ON APPEAL FROM THE UNITED STATES DISTRICT
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Petition for Rehearing

Now COME Appellees American Waterways Operators, Inc.; Gulf Atlantic Towing Corporation, Glidden-Durkee, a division of SCM, Corporation, Dixie Carriers Inc., Oil Transport Company, Incorporated, National Marine Service Inc., The Revilo Corporation, Eastern Seaboard Petroleum Company, Inc., Nilo Barge Line, Inc., Steuart Transportation Company, Interstate Oil Transport Company, Federal Barge Lines, Inc., Gulf Canal Lines, Inc., Ingram Ocean System Inc., American Institute of Merchant Shipping, Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The

London Steamship Owners' Mutual Insurance Association, Limited, Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association, Limited, Sunderland Steamship Protecting & Indemnity Association, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), and their respective members, who respectfully pray that this Honorable Court grant rehearing of this cause.

I

New Federal legislation enacted since all of the briefs herein were filed makes it clear that Congress has in fact preempted the area of financial responsibility to pay state-incurred clean-up costs; the provisions of Section 14 of the Florida Act requiring vessels to furnish special insurance or other evidence of financial responsibility should therefore be declared invalid as a wholly unnecessary and intolerable burden on interstate and foreign, as well as on intrastate commerce by water.

The holding of the slip opinion in 71-1082 that Florida may, without conflict with "the Federal Act",* require evidence of financial responsibility of vessels "[a]s respects damages" resulting from an oil spill** should, we submit, be reconsidered because (1) the legislative history of the Federal Act reveals that Congress did *not* intend states to

* The Water Quality Improvement Act of 1970, P.L. 91-224, 84 Stat. 91, as amended by Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, 33 U.S.C.A. §§1251-1376. The 1972 Amendments have not as yet appeared in the official U.S. Code.

** Slip Opinion, 71-1082, at p. 5.

have this power, and effectively preempted the field with respect thereto; (2) the 1972 Amendments* to the Federal Act not only confirm this fact, but make the furnishing of such evidence to each separate state unnecessary; and (3) if each separate state is empowered to require its individual and separate proof of financial responsibility in addition to that which vessel owners have already furnished to the Federal Government, an intolerable burden, as undesirable as it is unnecessary, will be placed on maritime commerce. This is not the only commercial difficulty which the slip opinion poses,** but it is the most immediate and pressing, and can—and should—be resolved in the present setting of this case.

Although the slip opinion is silent with respect to that portion of Section 14 of the Florida Act requiring evidence of financial responsibility insofar as *clean-up costs* are concerned, it is being interpreted by Florida officials as authorizing them to demand evidence of financial responsibility for *all* of the obligations imposed by the Florida Act.*** These requirements triggered the initial request for a temporary restraining order in this matter, granted by the Court below in 1971; renewal of these demands causes the problem now. Whether the requirement of evidence of financial responsibility be limited to pollution damages, or broadened to cover both damages and clean-up costs, the burden is equally intolerable. As will be discussed herein, the Federal Rules of Civil Procedure already

* P.L. 92-500; 86 Stat. 816, 33 U.S.C.A. §§1251-1376.

** See editorial in Journal of Commerce, May 2, 1973, ~~pages~~ Appendix A hereto.

*** Attached hereto as Appendix B are copies of a letter dated April 20, 1973 from the Director of the Division of Marine Resources, Florida Department of Natural Resources, to "All Vessel and Terminal Owners and Operators", with attachments consisting of forms titled "Application for Certificate of Responsibility", promulgated initially in March, 1971, and now reissued without change.

provide for security for damage claims in Admiralty,* and the enactment of new federal legislation has rendered the requirement of insurance or other evidence of financial responsibility to pay state incurred clean-up costs wholly unnecessary. Further, the legislative history of the Federal Act shows that its financial responsibility requirements are for the maximum amounts which could be insured. Congress thus preempted the field in this respect because it did not intend that states could impose any additional requirements, or bar from their waters a vessel which, having satisfied the Federal financial responsibility provisions, found it impossible to satisfy additional state requirements.

On October 18, 1972, (after all of the briefs had been submitted to the Court in this case), Congress enacted the Water Pollution Prevention and Control Act Amendments of 1972.** Insofar as water pollution by vessels is concerned, the principal change effected by the Amendments was the extension of the provisions of the 1970 Water Quality Improvement Act (W.Q.I.A.) *** to other hazardous substances in addition to oil.**** The Amendments require that the National Contingency Plan originally set up on August 20, 1971, pursuant to W.Q.I.A. to deal with the removal of oil, must also provide for the removal of hazardous substances from the navigable waters of the United States, their adjoining shorelines, and the waters of the

*Fed. R. Civ. P., Supplemental Rules for Certain Admiralty and Maritime Claims, Rules B, C and E. See *State Dept. v. S.S. Bournemouth*, 307 F. Supp. 922, 318 F. Supp. 839, 10 A.L.R. Fed. 950, 956 (C.D. Calif. 1969, 1970), which recognized that California had a maritime lien to secure payment of its oil spill clean-up costs.

** P.L. 92-500; 86 STAT. 816; 33 U.S.C.A. §§1251-1376.

*** P.L. 91-224, 84 STAT. 91.

**** Compare Sec. 11(b)(1) of WQIA: "... no discharges of oil into or upon ..." with Sec. 311(b)(1) of the 1972 Amendments: "... no discharges of oil or hazardous substances into or upon ..." And note new Sec. 311(a)(14) and Sec. 311(B) of the 1972 Amendments. 33 U.S.C.A. §§1321(b)(1), (a)(14) and (B).

contiguous zone.* The 1972 Amendments further *require*, for the first time, that this plan** "*shall*" include:

"(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal."***

The Senate Report (No. 92-1236, Committee of Conference) submitted by Senator Muskie made it clear that the intent of Subparagraph (H) was to encourage states to act within the framework of the National Contingency Plan, and to assure the states that they would be reimbursed for their efforts. The Report states:

"Subsection (c) (2), which requires a 'National Contingency Plan', is amended as proposed in the Senate bill to require that plan to include a system whereby the State or States affected by a discharge of oil or hazardous substance may act to remove the discharge and thereafter be reimbursed for reasonable costs." (p. 134)

Subsection (k)**** of Section 311, which was part of the 1970 Federal Act, authorized the appropriation of a \$35 million revolving fund to carry out the provisions of Sub-

* 86 Stat. 865, §311 (c) (2); 33 U.S.C.A. §1321 (c) (2).

** On December 18, 1972, after this cause had been argued, interim regulations setting up a system for reimbursement of State-incurred clean-up costs were published by the Council on Environmental Quality. 37 Fed. Reg. 28208.

*** 86 Stat. 865, §311(c)(2)(H); 33 U.S.C.A. §1321(c)(2)(H).

**** 86 Stat. 865, §311(k); 33 U.S.C.A. §1321(k).

sections (c), (d), (i) and (1),* the fund being replenished by payments made to the United States by owners and operators found liable under the Federal Act.**

It is thus plain that if Florida—or any other state—incurs clean-up expenses, in addition to those incurred by the vessel owner or operator, or the United States Government, or both, the State will be entitled under the 1972 Amendments to reimbursement by the Federal Government from the revolving fund. Any amount so reimbursed to the State will then become “a cost incurred by the United States Government” for which the Government will, in turn, be entitled to reimbursement from the vessel owner or operator in accordance with the provisions of the Federal Act.

It follows that in respect of clean-up costs, the State no longer has any possible reason to require from vessel owners evidence of insurance, a surety bond, qualification as a self-insurer, or “other evidence of financial responsibility satisfactory to the Department of Natural Resources,” as Section 14 of the Florida Act requires.

Section 14 of the Florida Act also requires insurance or other evidence in respect of State claims for civil penalties imposed by the Act. Insurance against liability for penalties for a person's own violations of law may be invalid as

* Subsection (c) authorizes the President to remove a discharge unless he determines that it will be done properly by the owner or operator, and provides for the National Contingency Plan previously discussed. Subsection (d) provides for coordination of all public and private clean-up and preventive efforts and for the summary removal and, if necessary, destruction of the vessel. Subsection (i) entitles a vessel owner or operator who removes a discharge of oil or other hazardous substance to reimbursement by the Government if he can establish one of the four defenses to absolute liability. Subsection (1) concerns delegation of the administration of the Section to the appropriate federal agencies.

** It is understood that \$20 million has been appropriated to the fund.

against public policy.* It would thus be impossible to comply with this requirement, which would effectively bar vessels from trading to Florida even though they had satisfied the Federal requirements for financial responsibility, which, properly, do *not* require proof of financial responsibility to pay the penalties the Federal Act imposes. In any event, if a vessel owner or operator violated the Florida Act, his vessel would be subject to judicial seizure** to secure payment of any fines and penalties which Florida might validly impose.

There remains the question of requiring evidence of financial responsibility to pay claims for shoreside *damage* to State and private interests, as distinguished from clean-up costs. Any owner of shoreside property who has a claim for damage due to an oil spill from a vessel now has the right to obtain security either by causing the offending vessel to be arrested,*** or by seizing the assets of the owner by writ of maritime attachment.**** These radical and effective procedures for obtaining security and jurisdiction are available to anyone having a maritime claim; under the Admiralty Extension Act, 46 U.S.C. §740, their benefits are completely available to claimants for damages to shoreside property. Since shoreside claimants can accordingly obtain jurisdiction, and security to cover any claims, there is no need to impose on vessel owners the burden of giving

* "In general, an insurance policy is against public policy and void if its purpose and intent are to indemnify [an] insured against a violation of law by him or with his permission, or to hamper or impede the enforcement of the law against the actual offender, as where it indemnifies [an] insured against the consequences of a violation of a criminal statute by him." 44 C.J.S., pp. 1005-6 (1945); see *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. den.* 397 U.S. 913 (1970).

** See *C. J. Hendry v. Moore*, 318 U.S. 133 (1943).

*** Fed. R. Civ. P., Supplemental Rules C and E.

**** Fed. R. Civ. P., Supplemental Rules B and E.

massive double security for claims which may never arise and which, because clean-up is undertaken under the aegis of the Federal Government pursuant to the National Contingency Plan, will in all likelihood be relatively minor.

It will be remembered that the vessels under discussion will all be vessels whose owners or operators, at considerable expense for marine insurance, application fees and "vessel certification" fees, have already convinced the Federal Maritime Commission (F.M.C.) of their financial responsibility to meet claims under W.Q.I.A., up to the lesser of \$100 per gross ton or \$14 million. The legislative history of W.Q.I.A. reveals that Congress, in setting these limits of liability, heard testimony on the availability of insurance, and that the evidence of financial responsibility required by the Federal Government is geared to the maximum. The following excerpts from the Report of the Committee on Public Works submitted by Senator Muskie, (United States Senate Report No. 91-351) relating to vessels are revealing:

"The type of liability to be imposed presented the committee with a great many questions. Extensive testimony was taken and subsequent extensive discussion occurred in executive session on the factors which should be considered in determining the type of liability. Among those factors were (1) the effect of too rigid a liability test on maritime commerce; (2) the availability of insurance for any specific amount or type of liability; (3) the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil and the consumer; and (4) the impact of a burdensome liability test on the U.S. Government and the people of the United States." (p. 5)

• • •

"Financial responsibility"

The bill establishes a mechanism whereby the U.S. Government can be assured that vessels using the waters of the United States are financially able to pay clean-up costs incurred by the U.S. Government up to \$100 per gross ton of the largest vessel owned or operated by a person. It requires that any vessel over 300 gross tons, including any barge unit of equivalent size, establish and maintain evidence of financial responsibility. The figure of \$100 is based on the committee's belief that absolute liability as imposed with exceptions is similar to the concept of liability based on negligence with a reverse burden of proof and therefore should be insurable to a similar level. The figure reflects an attempt by the committee to assure maximum protection to the U.S. Government while not requiring uninsurable evidence of financial responsibility." (p. 18)

After extensive hearings, Congress set its requirements for evidence of financial responsibility at the maximum considered insurable. Having thus effectively preempted the field, Congress did not leave room for individual states to make additional requirements; it is perhaps for this reason that the 1972 Amendments contained the provision discussed above setting up a system whereby states could recover their clean-up costs from the Federal fund. It is clear that Congress did not intend that a vessel which satisfied the Federal Government's requirements in this regard should be barred from the navigable waters of the United States. There are of course no such waters which are not also waters of a state, territory, or the District of Columbia. Even in the present setting of this case one can visualize the chaos which would overtake maritime commerce to and from the United States if financial responsibility legislation on the lines of the Florida Act were enacted by each of the coastal states without consideration of the four factors enumerated in the Report of Senator Muskie's Subcommittee, *supra*, p. 8.

Analysis of the Section* of the 1970 Federal Act concerning oil pollution reveals that independent preventive state action is contemplated only in Subsection (e), which deals solely with discharges "from an onshore or off-shore facility", and not with discharges from vessels. Subsection (c) (2) (A) contemplates that "State and local agencies" are to be assigned responsibilities under the National Contingency Plan with respect to minimizing damage from oil discharges generally. It thus appears that former Section 1161 (o) (2) of 33 U.S.C. was meant to preserve to the states their power to regulate *permanent* installations, and was *not* intended to extend their regulatory power to vessels engaged in interstate and international, or even intrastate, maritime commerce. This fact, plus the requirement that the evidence of financial responsibility under the Federal Act is geared to the maximum insurable, results in implied preemption, at least in this limited area, insofar as vessels are concerned. See *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972).

The form of insurance certificate required by Florida cannot be issued by the Appellee Mutual Insurance Associations because the form required contains no exceptions to liability—not even acts of war or nuclear incidents—and the Associations do not insure in respect of either. As can be seen from the excerpts from the Report of the Committee on Public Works, United States Senate, Report Number 91-351 submitted by Senator Muskie, the Committee accepted the fact that certain defenses and exceptions were essential to those providing insurance evidence of financial responsibility and geared its requirements accordingly. But because Florida has not accepted these defenses and exceptions, and will impose a penalty of up to \$50,000 per day pursuant to Section 16 of the Florida Act if a vessel calls at a Florida port without having furnished a type of evidence of financial

* 33 U.S.C.A. §1321, formerly 33 U.S.C. §1161.

responsibility which is simply not obtainable, the result is that vessels which have satisfied the Federal requirements will be barred from Florida waters. Incidentally, it should be noted that the Federal Maritime Commission has recognized all of the Appellee Insurance Associations as qualified insurers, and accordingly freely accepts their insurance certificates as evidence of financial responsibility under W.Q.I.A.* This being the case it should not be a requirement that insurers of vessels in international trade, accepted as qualified by the Federal Government, must also apply for qualification in every state at which one of their assured's vessels might occasionally call; yet this, as can be seen from Appendix B, is precisely what Florida is requiring.

In any case, the administrative burden and cost of issuing and maintaining in current status separate certificates of insurance for the benefit of Florida and every other state, country or province that might follow the example of Florida would present an insurmountable task. Marine insurance is changed with a change of ownership, and not infrequently even when ownership does not change. The Association concerned would have the burden of notifying every state, country and province to which an insurance certificate had been issued that it would no longer have validity after a specified date. Arrangements would some-

* W.J. Smith, *Financial Responsibility under the Water Quality Improvement Act*, 9 HOUST. L. REV. 657, 658-9 (1972). Also qualified is the Water Quality Insurance Syndicate. W.Q.I.S. is composed of 27 insurance companies, comprising virtually the entire American marine insurance market. Included in its policy limits of \$100 per gross ton or \$14 million, whichever is the lesser, is protection against such liability as may be imposed by any state, or any political subdivision thereof, for the cost of cleaning up an oil spill; *provided, however, that such liability is not any broader than under W.Q.I.A. itself, and that the state or municipal law recognizes the same defenses as are allowed thereunder*. Since Florida does not recognize these defenses, W.Q.I.S. certificates would not meet Florida's present requirements.

how have to be made to remove from the vessel the certificates of financial responsibility issued by the various national, state and provincial governments, unless new proof of financial responsibility was furnished. In the case of a purchase, the new owner would have to complete elaborate application forms, such as that required by Florida.

The owners and operators of foreign vessels, which supply a very large part of our energy and other needs, would be unable to qualify as self-insurers since they would not have the substantial assets "located in the United States or its possessions" contemplated by the Instructions for completing the "Application for Certificate of Responsibility" and by the "Application for Authority to Self-Insure" (See Appendix B hereto).

It is plain from the foregoing that enforcement of Section 14 of the Florida Act will leave many owners, whose responsibility has already been verified by F.M.C., with no choice (unless the charterers, consignees or some other third parties can meet Florida's requirements and can be persuaded to act as guarantors) but to exclude Florida ports from the trading limits specified in their time charters and consecutive voyage charters. This will not result in cleaner water—except as a result of a decrease in maritime commerce—but is bound to result in a substantial increase in the freight rates charged by vessels whose owners or charterers are able to satisfy Florida's requirements, e.g., by qualifying as self-insurers, and will result in a decrease in the quantities available to consumers of oil and other imports and a corresponding increase in their price. These untoward consequences—the result of allowing a state to impose requirements not contemplated by Congress initially, and any possible justification for which was removed by the 1972 Amendments to W.Q.I.A.—certainly constitute an undue burden on interstate commerce.

Florida's requirement that it be furnished evidence of financial responsibility by vessels using its ports is a head-on collision between the Federal and State governments which is apparent in the present setting of this case and which does not need to be demonstrated by a test case of a vessel being turned away from Florida waters by Florida officials, or penalized up to \$50,000 per day because of being within those waters without having given Florida evidence of financial responsibility. It is submitted that the Court should rule on this now, and not require subsequent time consuming and expensive litigation when a vessel, having satisfied Federal financial requirements, is nevertheless barred from state waters.

II

The slip opinion appears to vitiate the reforms sought to be accomplished by the Admiralty Extension Act; it should therefore be modified so as to require application of Federal maritime law to the determination of the basis of liability for ship-to-shore damage, whether the claim is heard by a State or a Federal court.

The slip opinion in its treatment of the Admiralty Extension Act* omits mention of the fact that it was passed to alleviate the injustice which previously existed in cases where land claimants—owners of a bridge, pier, *etc.*—had their property damaged by collision with a vessel. Under

* The Act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.* In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable water . . ." 46 U.S.C. §740 (Emphasis added).

the law existing prior to passage of the Act the vessel owner, whose claim was (and still is) governed by the General Maritime Law, could recover 50% of his damages from the land claimant in a situation where both parties were negligent, while the land claimant, who was obliged to proceed under the common law of his state, was generally barred from any recovery under the contributory negligence rule.* The Act placed both parties on an equal footing, allowing land claimants not only to recover in cases where both parties were negligent, but to invoke the admiralty remedies of arrest and writ of foreign attachment to pursue and secure recovery on their claims. It is of course undeniable that the damage to beaches caused by oil spillage from a vessel is a "case of damage or injury to . . . property, caused by a vessel on navigable water", and "done or consummated on land".** Accordingly, prior to issuance of the slip opinion, it would have been open to land claimants in such a case to proceed against pollution defendants either in a state court, pursuant to the saving clause of 28 U.S.C. §1333(1),*** or in the federal courts, their claims in either forum to be determined under uniform principles of substantive maritime law.

But the rationale of the slip opinion would defeat the purpose of the Admiralty Extension Act, since if State

* See Gilmore and Black, *The Law of Admiralty*, §7-17, pp. 432-434. See also, Briefs *Amici* of the Maritime Law Association of the United States (pp. 11-15) and the American Bar Association (pp. 2-3).

** Equally clear is the fact that *Victory Carriers v. Law*, 404 U.S. 202 (1971), involving an injury to a longshoreman while operating a "forklift" truck on shore, was not a case of injury "caused by a vessel on navigable water."

*** "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

1. Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

law is now to apply to claims by shore installations for damage by vessels, the result will be that contributory negligence of a drawbridge will, under Florida law as it is now, bar any recovery by it from a vessel, whereas under the General Maritime Law a vessel would be liable for half of the damages of the owner of the drawbridge, which might be the State of Florida.

The slip opinion does not distinguish between the admiralty jurisdiction of the Federal Courts, on the one hand, and the substantive law which is to be applied, regardless of the forum, on the other.* The necessity for observing such a distinction has recently been stressed by this Court in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). In discussing the question whether the Death on the High Seas Act** was intended to foreclose nonstatutory Federal remedies for wrongful death, which might otherwise be found appropriate to effectuate the policies of the General Maritime Law, Mr. Justice Harlan noted in *Moragne*:

"The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, during the course of which Representative Volstead, Floor Manager of the Bill and Chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the Federal Maritime Law. [Citation omitted]. This erroneous view disregards the 'saving clause' in 28 U.S.C. §1333, and the fact that *Federal Maritime Law is applicable to suits brought in State Courts under the permission of that clause.*" 398 U.S. at p. 400, note 14. (Emphasis added).

* The slip opinion states, p. 15, that the Act does not "sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the states". This result was never urged, and has never been thought required by the Act, the availability of a state forum being guaranteed by the "saving clause" *supra*.

** 41 STAT. 537; 46 U.S.C. §761 *et seq.*

Thus the slip opinion creates a situation in which it now becomes uncertain whether state substantive law may apply to the class of cases encompassed by the Admiralty Extension Act—sea-to-shore tort claims. Appellees submit that the conflict between the slip opinion and *Moragne* should be resolved, and the beneficial effects of the Admiralty Extension Act thereby saved.

If it is the intention of the slip opinion that the substantive law to be applied to ship-to-shore damages and injuries will depend upon choice of forum—Federal maritime law in a Federal forum and State law in a State forum—it will surely encourage “forum shopping”, a practice which has been uniformly criticized.*

On the other hand, if it is intended that only State *water pollution laws* such as the Florida Act are to be excluded from the maritime domain as extended by the Admiralty Extension Act, and that Federal maritime law is still to be applied to *other* ship-to-shore damages, then one class of shoreside damage claimants—shorefront property owners damaged by a discharge of oil from a vessel—will be given treatment radically different from that afforded to shoreside personal injury claimants and other shoreside claimants injured or damaged by vessels, as in a ship-to-bridge collision case.

The slip opinion quotes extensively from *Just v. Chambers*, 312 U.S. 383 (1941), in support of the doctrine that “a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile ‘to the characteristic features of the maritime law or inconsistent with federal legislation.’” But these were not

* See *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, at 410-411 (1953).

the only limitations imposed by *Just* on the right of the states to act in the maritime sphere. The Court in that case also noted that to have validity the state legislation must not "interfere with [the] proper harmony and uniformity [of the maritime law] in its international and interstate relations."*

It is thus plain that to find invalidity in state legislation in the maritime sphere it is not necessary that there be a direct conflict between State law and federal law; it is enough if the State law "interfere[s] with the proper harmony and uniformity" of the maritime law.

After a full hearing, the three-judge District Court unanimously found that if applied to Appellees' vessels "the Florida Act would effect—in the words of *Jensen*—the destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.' "*** This finding would appear to bring the Florida Act under the limitation on state power recognized in *Just*. But if any doubt remains as to the facts the slip opinion should be modified so as to call not for a reversal of the three-judge Court's unanimous decision but for a remand of the case to that Court with instructions to hear further evidence on and decide the question whether the Florida Act

* The criticism of *Southern Pacific v. Jensen*, 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart* 253 U.S. 149 (1920), Appellees submit, has been focused in the wrong direction. Their basic tenet—that federal authority in the maritime sphere is exclusive, except in matters of purely local concern—is the foundation of our national maritime policy. Any criticism of *Jensen* and *Knickerbocker* should, in Appellees' view, be directed, not to this basic tenet, but to the Court's finding in those cases that deaths and injuries of long-shoremen and similar shoreworkers are *not* matters of purely local concern.

** Opinion below, App. p. 44.

"interfere[s] with [the] proper harmony and uniformity [of the maritime law] in its international and interstate relations."

CONCLUSION

The slip opinion is being interpreted as giving each of the states as well as the Federal Government the power to legislate differing standards of liability for maritime commerce on the navigable waters of the United States to an extent which disturbs those who hitherto have regarded the United States of America as a maritime nation, rather than a loose federation of independent maritime states. The Attorney General of Florida is reported to have urged on the basis of the slip opinion that Florida's Senators vote against ratification of the International Convention on Civil Liability for Oil Pollution Damage,* because "the treaties were written by 'maritime oriented' delegates chosen by the State Department, not by environmentalists." (The Tampa Tribune, April 26, 1973, p. 24A). While the Court's consistent interpretation of the Admiralty Clause has enabled the Federal Government to deal with maritime problems on a uniform interstate and international basis, the slip opinion results in "Balkanization" and seems

* The 1969 Convention on Civil Liability for Oil Pollution Damage, Executive G, 91st Cong., 2nd Sess., was reported out favorably by the Senate Foreign Relations Committee with the recommendation that it be held in abeyance pending formulation of a supplementary convention setting up a fund of \$35 million to be available to claimants even where there is no liability on the part of the shipowner. The 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess., has since been signed and hearings with respect thereto have been held by the Senate Foreign Relations Committee. It may be reported out of Committee in late May or early June of this year. Senate Bill 841 is a bill which would implement both conventions.

to infer that this is acceptable, save with regard to the "... relationship of vessels plying the high seas and our navigable waters, to their crews."*

Appellees pray that the Petition for Rehearing be granted and the slip opinion be modified to the extent of declaring invalid (1) the provisions of Section 14 of the Florida Act requiring vessel owners and operators to furnish evidence of financial responsibility satisfactory to State authorities as a condition to the use of Florida's ports, and (2) the provisions of Section 12 substituting state substantive law for federal maritime law as the basis of liability for pollution damage caused by vessels to shore-side property.

Alternatively, Appellees pray that the case be remanded to the Court below for consideration of Commerce Clause and other Constitutional challenges not mentioned in the slip

* Slip Opinion, p. 18. May shipowners successfully argue that rights of land claimants in collisions between vessels and fixed structures are now to be decided under state law, because not involving vessel/crew relationships? It has been thought otherwise to date:

"The collision [between a vessel and an offshore drilling platform] was a classic maritime case within the validly extended Admiralty jurisdiction, in which both substantive rights and remedies . . . were quite ample. There is no void, there are no gaps. If there were, the Admiralty, under the guidance of a Judge having all the flexibility of a sea-going Chancellor, . . . has adequate resources without calling on adjacent state law." *Continental Oil Co. v. London Steamship Own. Mut. Ins. Ass'n.*, 417 F. 2d 1030, 1036-7 (1969).

In any case, neither *Southern Pacific v. Jensen*, 244 U.S. 205 (1917) nor *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) involved the relationship of ocean-going vessels "to their crews". *Knickerbocker* involved the death of a bargeman, and *Jensen* that of a longshoreman.

opinion, nor reached below,* by reason of the decision there that the Florida Act was an attempt "to legislate substantive maritime law which, under the United States Constitution is exclusively within the Federal domain."**

Respectfully submitted,

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* Modification and remand for consideration of issues in similar situations were summarily granted in *Union Trust Co. v. Eastern Airlines*, cert. den. 350 U.S. 907 (1955), reopened and remanded, 350 U.S. 962 (1956), and in *Parks v. Simpson Timber Co.*, unreported per curiam opinion of June 12, 1967 reversing judgment amended, and case ordered remanded for consideration of further issues below, 389 U.S. 909 (1967); 388 U.S. 459 (1967).

** Opinion below, Appendix p. 40.

Certificate of Counsel

We certify that this Petition is presented in good faith
and not for delay.

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APPENDIX A

THE JOURNAL OF COMMERCE AND COMMERCIAL

99 Wall Street, New York, N.Y. 10005
New York, Wednesday, May 2, 1973

An Issue Still With Us

WHATEVER MAY be said about the legal reasoning upon which the Supreme Court based its decision upholding the Florida oil spill law, this much is apparent: It solves nothing. Problems are multiplied, not reduced. All that is established is the prospect of confusion, litigation, and the thwarting of any genuinely effective national policy governing liability for pollution in the transport by water of an essential fuel. This comes at a time when the energy crisis is recognized by the American people as approaching the most serious proportions.

It is unfortunate that cases such as that involving the Florida act, almost inevitably, are viewed by some elements as tests between the righteous foes of pollution and those who, for their own profit, seek to escape with minimal penalties when their operations cause pollution of the environment. This was in no sense an issue in the test of the Florida law. Predictably, however, no sooner had the Supreme Court announced its decision than the advocates of extra-tough local environmental statutes were hailing it as a victory.

Assemblyman Chester Apy of New Jersey, for example, said he would introduce legislation based on the Florida law, "set up so that we could sue for both costs and damages, no matter if the spill occurred beyond the three-mile limit—once it washes into our waters, the party responsible would be sued."

* * * *

Appendix A

IN DELAWARE, the House majority leader of the legislature, who just happens to come from the resort area of Rehoboth Beach, said the state's already stringent law would be made tougher, following the Florida pattern. Delaware's coastal zoning act already forbids creation of an offshore "superport" in the state's coastal waters and now, commented former Governor Russell W. Peterson, the state has "the strength to cope with a superport," presumably a reference to the proposed oil transfer facility which would be in ocean waters outside Delaware Bay.

Delaware probably is not the only state which would like to see all aspects of oil shipment, with the danger of pollution, kept away from its shores. But we feel safe in saying that the people of Delaware, New Jersey or any other state also want their supplies of gasoline and fuel oil to continue uninterrupted, and at a reasonable cost. Neither the nation's energy needs nor the nation's anti-pollution objectives can be well served by simply frightening tankers away with a hodge-podge of local statutes, alike only in their disregard for established and reasonable standards of maritime liability.

Both United States law and the international conventions drafted to combat pollution specify limits on the shipowner's liability—\$14 million and \$15.4 million, respectively. They exempt the vessel where it is the victim of conditions beyond its control, such as a severe storm, an act of war, government negligence in wrongly placing channel markers, and so on. But the Florida law allows unlimited liability for damages, it imposes "absolute liability," meaning no exceptions regardless of circumstance, and it requires among many other things, separate proof of the vessel's financial responsibility under the state law.

Appendix A

While the Supreme Court opinion remarks that the Federal Limitation of Liability Act extends "to damages caused by oil spills even where the injury is to the shore," the interpretation in the industry is that the decision nevertheless gives the green light to states to adopt legislation similar to Florida's. Indeed, it places their legislatures under heavy pressure to do so, since no politician will wish to be accused of less zealous concern for the environment than those in other states.

In this manner, the decision sets back most seriously the endeavor to establish a firm, coherent, reasonable, readily understood, uniform national policy with respect to liability for pollution in the navigable waters of the United States. The mood of the advocates of localized legislation such as Florida's was revealed in disquieting fashion by the state attorney general's declaration, following the decision, that the United States now should refuse to ratify the international convention dealing with liability for oil spills.

. . . .

THE UNANIMOUS Supreme Court decision reversing the federal court in Florida makes these points:

"To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent. . . . Moreover, while the federal act determines damages measured by the cost to the United States for cleaning up oil pollution, the damages specified in the Florida act relate in part to the

Appendix A

cost to the State of Florida in cleaning up the spillage. These two sections are harmonious parts of an integrated whole. . . . A state may have public beaches ruined by oil spills. Shrimp, clam, oyster and scallop beds may be ruined and the livelihood of fishermen imperiled. The federal act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning up."

ALL THIS MAY leave one with the impression that the Florida act or any similar state legislation is no more than a claim for what is just and reasonable. But it seems to us that the court's opinion, written by Justice Douglas, achieves this effect only by deferring to some future date the legion of difficulties which may realistically be expected as a result of the decision.

For example, what if the state does the cleaning up, at greater cost than if the Federal Government had done it? Writes Justice Douglas: ". . . It will be time to resolve any such conflict between federal and state regimes when it arises." What about the Florida act's requirements for oil spill "containment gear," normally a subject of federal regulation and covered in rules issued by the Coast Guard in 1972? The answer, says the court, must "await a concrete dispute under applicable Florida regulations."

It should be kept in mind, moreover, that the number of "conflicts" and "concrete disputes" in this instance must be multiplied by the number of states adopting similar laws.

As for destruction of oyster and scallop beds and similar damage to natural marine resources because of oil spills, injured parties would still have recourse to the general maritime law to satisfy their claims. In fact, Congress did not provide for such claims in the 1970 Water Quality Improvement Act for the very reason that it was fully aware of these other avenues.

Appendix A

The Florida act was opposed in the courts by the American Institute of Merchant Shipping, the American Waterways Operators, Inc., representing the barge and towboat industries, and some 15 maritime insurance "protection and indemnity" groups. Their contention was that the paramount authority over maritime activities in waters of the United States and inland waterways belongs to the Federal Government under the Constitution and that the Florida law runs contrary to several acts of Congress and to the long precedents of maritime law.

A number of states already have adopted water pollution laws which vitally affect shipping, AIMS and the P&I groups said in their brief to the Supreme Court. They added: "These laws are by no means uniform, and their enforcement could lead to chaotic results."

That was the real issue in the Florida case. The Supreme Court's decision leaves it unanswered. It is still with us, larger than ever.

APPENDIX B

**STATE OF FLORIDA
DEPARTMENT OF NATURAL RESOURCES**

April 20, 1973

**All Vessel and Terminal
Owners or Operators**

Gentlemen:

On April 18, 1973, the United States Supreme Court re-validated the Oil Spill prevention and pollution control Act, Chapter 376, Florida Statute.

As Director of the Division of Marine Resources, Florida Department of Natural Resources it is my responsibility to furnish you the enclosed applications. This will enable you to comply with the provisions of this Chapter.

If additional information is needed, please contact Major John Walker, in care of this Department.

Sincerely,

**Harmon Shields, Director
Division of Marine Resources**

**HS/jwg
Enclosures**

Appendix B

FORM FMP—0-7A

FLORIDA DEPARTMENT OF NATURAL RESOURCES
APPLICATION FOR CERTIFICATE OF FINANCIAL
RESPONSIBILITY (VESSELS AND BARGES)

INSTRUCTIONS

Submit the application to the Executive Director, Florida Department of Natural Resources, Larson Building, Tallahassee, Florida, 32304, U.S.A. The application is in four parts: Part I—General; Part II—Evidence of Financial Responsibility; Part III—Declarations; and Part IV—Concurrence of Agent. Applicants must answer all questions. If a question does not apply, answer "not applicable" or "none", as appropriate. If additional space is required, supplementary sheets may be attached.

Part I.

1. Self explanatory.
2. Previously issued certificates refer to certificates of financial responsibility for vessels and barges, and not for terminal facilities.
3. Self explanatory.
4. See Part IV and execute. Legal agent must be located in Florida for purpose of service of process.

Part II.

5. Self explanatory.
6. Self explanatory. (See Chapter 16B-16.08)
7. Self explanatory. (See items 8, 9, 10, 11)

Appendix B

8. Form FMP-0-0801 and the insurance policy, complete with all exclusions and endorsements, must accompany this application, if applicant intends to show evidence of insurance.

Evidence of Insurance must be conditioned to pay all costs and expenses of the cleanup of any prohibited discharge or other polluting condition as well as damages caused to the state and any other person.

Insurance companies must be either authorized to do business in the State of Florida or approved by the Surplus Lines Carrier list which is compiled monthly by the National Association of Insurance Commissioners.

Please note that policies issued pursuant to the requirements of the Federal Maritime Commission will not be accepted by the Florida Department of Natural Resources for compliance with the requirements of Chapter 376, Florida Statutes.

9. Form FMP-0-0802 and power of attorney must accompany application, if applicant intends to show evidence of a surety bond.

10. Form FMP-0-0803 and required escrow deposit must accompany application, if applicant intends to qualify as a self-insured.

11. Any guarantor (third party) of any applicant must show financial responsibility either through the method of insurance, surety bond, self insurance, or other evidence acceptable to the Department. Appropriate proof must accompany the application. Form FMP-0-0804 must accompany application if applicant intends to qualify through a guarantor.

Appendix B

Form FMP-0-0805 must accompany application if applicant intends to qualify under evidence of other financial responsibility. A financial statement reflecting the applicant's most recent financial condition shall accompany the application. The financial statement shall consist of a balance sheet, income statement and a statement of retained earnings and shall be certified by a certified public accountant licensed in any state of the United States or a public accountant licensed by the State of Florida Department of Professional and Occupational Regulation. The financial statement shall be examined by the Department staff. A negative staff opinion shall result in disapproval of the application.

All assets included in the financial statement must be located within the United States or its possessions.

Part III. Self explanatory.

Part IV. Self explanatory.



FLORIDA
DEPARTMENT OF NATURAL RESOURCES
APPLICATION FOR CERTIFICATE OF
FINANCIAL RESPONSIBILITY (VESSELS)

NAME OF STATE OR FOREIGN COUNTRY IN WHICH INCORPORATED:

DATE OF INCORPORATION OR
ORGANIZATION:

6.

(c) IF A PARTNERSHIP, GIVE NAME AND ADDRESS OF EACH PARTNER:

7.

(d) APPLICANT'S FISCAL YEAR:

(month) (Day) TO (month) (Day)

STATE AND ADDRESS OF APPLICANT'S FLORIDA AGENT OR OTHER PERSON AUTHORIZED BY APPLICANT TO
ACCEPT LEGAL SERVICE IN THE STATE OF FLORIDA (See PART IV).

FOR